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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,

Appellants,

against

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AS *AMICUS CURIAE*

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BRIEF OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AS *AMICUS CURIAE*

The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties submitted herewith.

Interest of the *Amicus Curiae*

The American College of Trial Lawyers is a national organization of lawyers skilled and experienced in the trial of cases, concerned with the improvement and the enhancement of the standards of trial practice, the administration

of justice and the ethics of the trial branch of the profession. Its members are carefully selected by an elaborate nominating and screening procedure from lawyers with high standards who have engaged in trial practice for at least fifteen years. Membership is limited to not more than 1% of the lawyers licensed to practice in a state. The College has deep concern with the maintenance of fair trials and the protection of the constitutional rights of litigants.

This concern leads the College to present to the Court its views on the nature of a criminal defendant's right to a fair trial and the impact of television thereon. The College has formally expressed its opposition to the use of television in trial or appellate proceedings.* The College is concerned at the current rush of authorities in some states, responding to the intense pressure exerted by the media for many years, toward televising all judicial proceedings. It believes that this practice is fraught with dangers to the right of criminal defendants to a fair trial in ways hard to demonstrate by empirical evidence or to test by usual methods of appellate review. The College urges the Court to announce, firmly and unmistakably, its opposition to provisions which permit the televising of judicial proceedings, such as Canon 3A(7) of the Code of Judicial Conduct of the State of Florida, 32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.), in order to safeguard the fundamental

* In August, 1979 the Board of Regents of the American College of Trial Lawyers (its governing body) adopted the following resolution:

> The American College of Trial Lawyers expresses strong opposition to the use of television in trial or appellate proceedings as being wholly inconsistent with the right of the parties to a fair trial or a fair appellate hearing and as being incompatible with the interests of justice.

guarantee of a fair trial contained in the Sixth and Fourteenth Amendments to the Constitution of the United States.

Summary of Argument

Appellants were denied their right to a fair trial under the due process clause of the Fourteenth Amendment by the presence of television cameras in the courtroom and the broadcast news coverage of their trial over their objection. Included within this right to a fair trial are the Sixth Amendment guarantees of the right to an impartial jury and judge, the right of confrontation and the right to counsel. Courtroom television of trials is fundamentally inconsistent with these guarantees because of the adverse impact of television, which has been documented, on each of the participants in a criminal trial—the jurors, the witnesses, the judge and the defendant.

The First Amendment guarantee of freedom of the press and the Sixth Amendment right of public trial do not imply any constitutional right to the presence of television cameras in the courtroom. The right of a public trial is a defendant's right, intended for his protection. The right of access of the press to judicial proceedings is no greater than that of the public itself. What is involved here is not freedom of expression but the regulation of access to the courtroom by certain media equipment. The right of an individual defendant to a fair trial is too important to be subordinated to competing interests.

The chief objective of a trial, to ascertain the truth, is not fostered by the use of television in the courtroom. The

educational benefits and increased public understanding of judicial proceedings purported to be gained by the use of television are both speculative and secondary to the purpose of a trial. Not only will televising trials not provide the benefits claimed, but any benefits are far outweighed by the instances of prejudice and abridgement of the rights of the criminally accused.

ARGUMENT

POINT I

The presence of television cameras and other broadcast equipment in the courtroom denied appellants their right to a fair trial.

The due process clause of the Fourteenth Amendment guarantees the accused those fundamental rights which are essential to a fair trial. *Estelle* v. *Williams,* 425 U.S. 501 (1976); *Drope* v. *Missouri,* 420 U.S. 162 (1975). The right to an impartial jury, *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Turner* v. *Louisiana,* 379 U.S. 466 (1965), the right of confrontation, *Pointer* v. *Texas,* 380 U.S. 400 (1965), and the right of representation by counsel, *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), have all been held specifically applicable to the states and within the embrace of the Fourteenth Amendment's guarantee. These fundamental rights, however, are necessarily impaired by the presence of television cameras in the courtroom.

In *Estes* v. *Texas,* 381 U.S. 532 (1965) [hereinafter cited as *Estes*], this Court was faced with much the same question as the instant case presents. There, the defendant,

Billie Sol Estes, was convicted of having induced farmers in Texas to purchase fertilizer tanks and equipment which did not exist and to deliver to him chattel mortgages on the fictitious property. Because of his associations with prominent Texas politicians, Estes' trial generated a great deal of media attention, and was televised over his objection. This Court reversed that conviction, holding that the presence of television cameras in the trial courtroom introduced into the proceedings a factor so at odds with the fundamental purpose of a criminal trial and so inherently prejudicial to the defendant's rights as to amount to a denial of due process.*

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* The American Bar Association filed a brief *amicus curiae* in the *Estes* case, urging reversal there because of the prejudicial impact on a defendant's rights of televising a criminal trial. As that brief noted (at pp. 3-8), the American Bar Association has consistently opposed televising judicial proceedings since the adoption of Canon 35 of the Canons of Judicial Ethics in 1937. See *Estes, supra,* 381 U.S. at 596-601 (Harlan, J., concurring) for an account of the development of Canon 35 from its adoption in 1937 to its reaffirmation by the House of Delegates in February, 1963.

Since 1963, the American Bar Association has, on several occasions, restated its opposition to the presence of television cameras in the courtroom. In 1972, the House of Delegates adopted the present Code of Judicial Conduct, which incorporates, in Canon 3A(7), the prohibitions of former Canon 35. Canon 3A(7) provides:

> A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
>
> (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
>
> (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
>
> (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
>
> (i) the means of recording will not distract participants or impair the dignity of the proceedings;

(footnote continued on next page)

Certain comments by Mr. Justice Clark, writing for the Court, *see* 381 U.S. at 551-52, and Mr. Justice Harlan, in his separate concurrence, *see* 381 U.S. at 595-96, have been seized upon by television's advocates as indicating that technological advances made in television equipment since 1965 have vitiated the Court's finding of prejudice. It is argued that new cameras which can be operated without kleig lights and placed at "unobtrusive" locations in the courtroom, will have no adverse impact on the trial process. Indeed, these portions of the *Estes* opinion were referred to specifically by the Florida Supreme Court in its opinion in *In re Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 773 (Fla. 1979), which approved the modification of Canon 3A(7) of the Code of Judicial Conduct of the State

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(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Since 1972 the American Bar Association has twice affirmed its support of Canon 3A(7). In August, 1975 the Task Force on Courts and the Public proposed that " 'there be referred to the appropriate committee . . . the question of revision of Canon 3A(7) of the Code of Judicial Conduct to permit electronic news media to cover courtroom proceedings.' " The House of Delegates rejected the proposal by voice vote. *Courtroom TV Study Turned Down,* 61 A.B.A.J. 1085 (1975).

In February, 1979 the House of Delegates rejected a proposal by the Committee on Association Standards for Criminal Justice to allow the highest appellate courts of the various state and federal jurisdictions to exercise supervisory authority by rule to permit electronic coverage of judicial proceedings. *Cameras Out of Courtrooms?,* 65 A.B.A.J. 304 (1979).

These actions clearly demonstrate the continued opposition of the American Bar Association to the televising of criminal trials.

of Florida, 32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.), to permit television coverage of judicial proceedings.

Estes cannot, however, be so conveniently thrust aside, nor may its constitutional holding be so drastically curtailed, for neither Mr. Justice Clark nor Mr. Justice Harlan held the fair trial right of the criminally accused hostage to technological improvements in the hardware of electronic journalism. The opinion of the Court clearly sets forth the restrictions which had been placed on the cameras during the *Estes* trial:

> A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.
>
> . . . [L]ive telecasting was prohibited during a great portion of the actual trial. Only the opening and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury. 381 U.S. at 537 (footnote omitted).

Mr. Justice Harlan also commented upon the physical setting:

> Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, "commercials" at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial —relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom. 381 U.S. at 588.*

For the *Estes* Court, then, the constitutional objections to televising a criminal trial stemmed not from physical disruption (although that may, of course, deprive a defendant of a fair trial), but from the probability that the mere presence of cameras and recording devices in the court-

* Mr. Justice Harlan limited his holding in *Estes* to "notorious" cases. However, he was uncertain that that limitation was meaningful, since "it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice [in a 'run-of-the-mill' case], though less severe, are nonetheless of constitutional proportions." 381 U.S. at 590. That limitation is not relevant to this case, since, as appellants note, their status as police officers and the unusual tape recordings made by a "ham" radio operator, which were admitted into evidence, made the trial below a most newsworthy event. It is submitted, however, that the unconstitutionally prejudicial impact of television upon the trial process should not be made dependent upon the notoriety of the accused or the lurid nature of his crime. It is the untoward effect of television upon the institutional functioning of the criminal trial which creates constitutional difficulty.

room would have an effect on the trial participants prejudicial to the accused:

> . . . [A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was *In re Murchison*, 349 U.S. 133 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> > "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U.S. 11, 14." At 136. (Emphasis supplied.)
>
> And, as Chief Justice Taft said in *Tumey* v. *Ohio*, 273 U.S. 510, almost 30 years before:
>
> > "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict a defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." At 532. (Emphasis supplied.)
>
> 381 U.S. at 542-43.

These concerns were also of paramount importance for Mr. Justice Harlan:

> Courtroom television introduces into the conduct of a criminal trial the element of professional "showmanship," an extraneous influence whose subtle capacities

> for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. 381 U.S. at 591.

The *Estes* Court identified four major areas in which the presence of the television camera "might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge." 381 U.S. at 545. The situations specified were the effects of courtroom television on the jurors, the witnesses, the trial judge and the defendant. *Id.* at 545-50. Although television's advocates frequently contend that the possibilities for prejudice noted by the *Estes* Court lack empirical proof and are the overwrought product of simple resistance to change, results of psychological studies and the *very statistics* concerning the effects of courtroom television compiled and relied upon by the Florida Supreme Court* to support the televising of trials actually show that television does have an impact upon each of the participants in a trial, and hence does create the inherent prejudice which was at the heart of the *Estes* Court's decision.

1. Impact on the Jury.

The Sixth Amendment guarantee of "trial, by an impartial jury" is a right of fundamental importance, and is binding on the States through the Fourteenth Amendment. *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).

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* A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978, prepared by The Judicial Planning Coordination Unit, Office of the State Courts Administrator. *See In re Post-Newsweek Stations, Florida, Inc., supra,* 370 So.2d at 767-69.

These statistics are compiled in Part IIA(1) (Survey Results—Frequencies) of the Survey [hereinafter cited by reference to § and question within Part IIA(1)].

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors . . . "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961).

Initially, potential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pretrial hearings and motions from which the jury is ordinarily excluded. Hence, evidence otherwise inadmissible may leave an indelible mark.

Once the trial begins, jurors' exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. *Estes, supra,* 381 U.S. at 546; *see* Cantrall, *A Country Lawyer Looks at Canon 35,* 47 A.B.A.J. 761, 763 (1961).

Even though the trial court may give repeated warnings to the jury not to discuss the case, and even though conscientious jurors may heed an admonition not to watch television reports dealing with the case on trial before them (reports which are likely to be woven into news

programs with little or no advance warning to the viewer), it seems undeniable that jurors will be subject to the pressures of television-watching family, friends and, indeed, strangers. "We lawyers know that unfortunately a word dropped outside the courthouse to a juror sometimes has more influence than the evidence itself." Tinkham, *The Bar and Canon 35,* 19 F.R.D. 19, 24 (1955). Additionally, in the absence of a rule prohibiting filming of jurors themselves, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing strangers, or perhaps harried by intruding telephone calls.

Psychological studies have repeatedly shown that the cloak of anonymity is the surest guarantee of independence in a decision-making process such as a jury trial.* Intrusion of the television camera into the courtroom, particularly in a controversial or highly-publicized trial, may threaten the jurors' ability to arrive at a fair and independent determination by simultaneously robbing them of their anonymity and reminding them of the intense public interest in the trial.

A report of a study by Dr. J. N. Finkelstein, a University of Washington clinical psychologist, noted that

> "A series of studies done by social psychologists in the 1960's . . . found that the more 'public' a decision was, the more likely individuals would

* Mouton, Blake and Olmstead, *The Relationship between Frequency of Yielding and the Disclosure of Personal Identity,* 24 Journal of Personality 339 (1956); Raven, *Social Influence on Opinions and the Communication of Related Content,* 58 The Journal of Abnormal and Social Psychology 119 (1959).

> form their opinion to what they believed the group believed."

> And Dr. Finkelstein noted that televising a trial which the public believes should end in conviction is an external pressure to convict. Murphy, *Trend to Televised Court Proceedings: A Step That Needs Time and Study,* New York Law Journal, Jan. 25, 1979, at 25, col. 3, at 27, col. 2.

Mass opinion conveyed through the peering lens of the camera is surely "anathema to the very conception of a fair trial." Douglas, *The Public Trial and the Free Press,* 46 A.B.A.J. 840, 844 (1960).

Another problem, and one which is particularly difficult to assess, is that of jury distraction. Although disruptions caused by the physical presence of cameras and cameramen in the courtroom may be controlled by technological advances and supervision by the trial judge, the simple awareness by jurors that they are being televised will have an ongoing impact throughout the course of the trial.

> Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony. *Estes, supra,* 381 U.S. at 546.

The Florida Supreme Court's own statistics are most enlightening on the effect of television on jurors. Indeed, it is difficult to understand how the Florida Court could have disregarded these statistics, as it appears to have done. In response to questions asking whether the presence of cameras and other equipment in the courtroom affected the jury, fully one-third of the jurors surveyed replied that they felt at least "slightly" self-conscious,* while

* § 1, question 9.

41% of the attorneys and 35% of the court personnel surveyed stated that jurors were caused to be "moderately" to "extremely" self-conscious because of the camera's presence.* Asked whether they were distracted by the cameras, more than 23% of the jurors responded that they were at least "slightly" distracted.** In response to a similar question, 33% of the attorneys and 25% of the court personnel replied that jurors were "moderately" to "extremely" distracted.† Similarly, more than 25% of the jurors admitted that they were made at least "slightly" nervous by the camera's presence.‡ Of the attorneys surveyed, 29% felt the cameras made jurors "moderately" to "extremely" nervous; 30% of the court personnel responding agreed.¶

The only possible solution to this difficult problem would be to require the sequestration of all juries in televised cases. We submit, however, that this would constitute an inordinate financial burden on the state, and an undue imposition on individual jurors.

Ultimately, television will preclude the rendering of an impartial verdict in those cases most in need of disinterested adjudication and most likely to be televised—the criminal

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* § 3, question 13; an additional 26.4% of attorneys and 36% of court officers surveyed found jurors to be "slightly" nervous because of cameras present in the courtroom.

** § 1, question 13.

† § 3, question 16; another 30.8% of attorneys and 28% of court personnel felt jurors were "slightly" distracted by the cameras.

‡ § 1, question 11.

¶ § 3, question 15; an additional 28% of attorneys and 29% of court personnel found jurors "slightly" nervous because of cameras in the courtroom.

trial of an unpopular or infamous defendant. The familiar truism should be applied here—the rights of all are secure only if the rights of the most detested are vindicated according to the rule of law.

2. Impact on the Trial Judge.

The trial judge plays a pivotal role in sustaining the atmosphere of impartiality mandated by the Sixth and Fourteenth Amendments. *See Glasser* v. *United States,* 315 U.S. 60, 82 (1942). His difficult task, one which requires his undivided attention, is to make certain that the accused receives a fair trial. This requirement of an impartial judge attending to the administration of the trial and the adjudication of testimony and argument without extraneous influence is incompatible with the distractions of television. When the television cameras enter the courtroom, the trial judge must supervise them. The problem of the divided attention of the trial judge was a factor cited by the *Estes* Court in reversing the conviction in that case. 381 U.S. at 548.

The experience of Florida's trial judges in attempting to supervise televised trials is most illuminating. The judges of the Florida Circuit Courts reported that they

> were required in many instances to spend inordinate amounts of time seeing that guidelines were being followed and contacting the media designated representative, particularly with reference to media activities and congestion in the hallways and at the monitor stations.
>
> * * *
>
> Most of the court proceedings in which the media has shown an interest during the experimental period

> are those in which the demands on the court's time, legal knowledge, concentration and patience are already greatly burdened and taxed.
>
> * * *
>
> The presence of the media and the resolution of conflicts caused by their presence has greatly taxed the trial court, adding hours, sometimes days, to his task. Report of the Florida Conference of Circuit Judges at 10-11.

The Circuit Court Judges opposed modification of Florida Canon 3A(7) to permit televising judicial proceedings. *See In re Post-Newsweek Stations, Florida, Inc., supra,* 370 So.2d at 770.

Aside from the additional burdens placed upon the trial judge in supervising media conduct in the courtroom, it is clear that the news media can bring tremendous pressure on the trial judge to permit televising of proceedings in his courtroom. Such pressure is bound to affect the judge's outlook: if he decides not to allow television, he will be subjected to the charge of discrimination and being old fashioned. Such pressure can be used as a crude political weapon through the media's power to shape public opinion where judges are elected. Pressure of this sort on individual judges will only intensify where one judge in a state or district allows the cameras into his courtroom. *See Estes, supra,* 381 U.S. at 548-49; Graham & Fretz, *Cameras in the Courtroom: A Dialogue,* 64 A.B.A.J. 545, 549 (1978); Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered,* 48 A.B.A.J. 615 (1962).

To adhere to Lord Mansfield's classic standard of the impartial and independent judge:

> I wish popularity: but, it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press; I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. *Rex* v. *Wilkes,* 4 Burrow's 2527, 2562 (K.B. 1770)

would be difficult, if not impossible, when the pressure of public opinion is brought to white heat by television.

Finally, it is not unfair to recall that judges too are human, and may be subject to distractions from the business at hand simply from an awareness of being televised.

3. Impact on Witnesses.

The Sixth Amendment provides that the accused in a criminal trial shall have the right "to be confronted with the witnesses against him." This right of confrontation consists of the traditional right to cross-examine adverse witnesses. *See* 5 Wigmore, *Evidence* § 1397 (Chadbourn Rev. 1974). This right to confront and cross-examine, as well as to introduce rebuttal testimony, is stripped of all meaning when a trial is televised.

The practicing lawyer knows the difficulty of arranging the attendance of witnesses. They are often afraid, un-

accustomed to appearing or speaking in public, and plagued by the gnawing doubt that they will be unable "to do justice to the facts and to themselves." Cantrall, *A Country Lawyer Looks at Canon 35, supra,* 47 A.B.A.J. 761. Already reluctant, the potential witness facing the possibility of being televised "for the world to see his struggle to express himself and to outwit the cross-examiner" will be that much more unavailable. *Id.* The timid will inevitably shrink from attendance, while the outgoing will fear that momentary lapse or gesture—amusing or ridiculous for all to see—caught and fastened by the camera, for the possible entertainment of millions. To have to subpoena the reluctant witness to compel him to undergo the publicity he dreads will only heighten the already distracting presence of the television lens. *Id.*

These fears do not exist in a vacuum. The Report of the Florida Conference of Circuit Judges cites one case in which government witnesses, then in prison, "were reluctant to testify in front of a camera for fear of their safety on return to prison. One such witness was held in contempt for refusing to testify under those conditions." Report of the Florida Conference of Circuit Judges, *supra,* at 15.

Once he begins to testify, the witness who does appear will be ever conscious of being televised not only on direct examination but, significantly, on cross-examination where he will be embarrassingly forced to retrace his steps and less likely to recant under the gaze of such a vast audience. The operation of this adversary prodding, designed as it is for getting that much closer to the truth, is difficult

enough under normal courtroom circumstances, but is completely thwarted by the camera's gaze.

Concern that the quality of testimony in criminal trials might be adversely affected by the presence of television was central to the decision in *Estes*. *See* 381 U.S. at 547-48, 591. It is a concern borne out both by psychological studies* and by the Florida Supreme Court's survey results. When asked if the presence of cameras and other equipment in the courtroom made them feel self-conscious, nearly 54% of the witnesses responding admitted that they were affected at least "slightly,"** and nearly 29% said they felt "moderately" or "extremely" self-conscious. In response to a similar question, 48.5% of the court personnel and 47% of the attorneys surveyed replied that witnesses were made "moderately" to "extremely" self-conscious by the camera.† Asked if the camera made them nervous, 46.7% of the witnesses stated that they felt at least "slightly" nervous;‡ 43% of the attorneys and 34% of the court personnel responded that the witnesses were "moderately" to "extremely" nervous before the camera.¶ And 39.4% of the witnesses responding stated that they were at least "slightly" distracted by the cam-

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* *See, e.g.*, Lezak, *Some Psychological Limitations on Witness Reliability*, 20 Wayne L. Rev. 117 (1973).

** § 1, question 9.

† § 3, question 1; in addition 36.9% of the court personnel and 28.4% of the attorneys responded that witnesses were made "slightly" self-conscious by the camera.

‡ § 1, question 11.

¶ § 3, question 3; an additional 32.6% of attorneys and 43.7% of court personnel felt the witnesses were "slightly" nervous when on camera.

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eras,* while 34.5% of the attorneys and 24% of the court personnel felt that cameras were "moderately" to "extremely" distracting to witnesses.**

Perhaps most disturbing, 56% of the lawyers and 55.5% of the court personnel responding felt that witnesses were at least "slightly" *inhibited* by the camera's presence.† These statistics show only too plainly that the concerns of the *Estes* Court were not mere idle speculation.

Finally, televising the testimony of trial witnesses completely vitiates the rule against the presence of witnesses in the courtroom, since the testimony of a prospective witness will just as surely be contaminated by watching the televised performances of those who precede him on the stand. *Estes, supra,* 381 U.S. at 547.

4. Impact on the Defendant.

The impact of courtroom television may well hit hardest on the defendant himself. Indeed, the *Estes* Court went so far as to label the camera's presence "a form of mental —if not physical—harassment, resembling a police line-up or the third degree." 381 U.S. at 549. The television cameras may also have an adverse effect on a defendant's willingness to testify, and make him less able to give perhaps crucial testimony to the jury in a convincing manner.

Further, telecasting may also deprive the defendant of the right to the effective assistance of counsel. *Estes,*

* § 1, question 13.

** § 3, question 6; 40% of court personnel and 28.3% of attorneys felt witnesses were "slightly" distracted by the cameras.

† § 3, question 7.

supra, 381 U.S. at 549. Counsel cannot represent conflicting interests or owe loyalty elsewhere without violating a defendant's Sixth Amendment guarantee of "assistance" and, therefore, his Fourteenth Amendment due process protection. *See Glasser* v. *United States, supra,* 315 U.S. at 70; *see also Von Moltke* v. *Gillies,* 332 U.S. 708, 725-26 (1948). Nor is a defendant adequately represented if counsel is so impeded by his estimation of the facts that his conscience prevents him from arguing before the jury on behalf of his client. *See Johns* v. *Smyth,* 176 F. Supp. 949 (E.D. Va. 1959). The transformation of the courtroom into a "moving picture theater" is a distraction which cannot help but unconstitutionally impair the undivided effectiveness of counsel.

More broadly, lawyers, like others, may be affected by the presence of television cameras and become concerned, if only subconsciously, with their appearance to the world, rather than thinking only of doing whatever is necessary, however unpopular that may be, to protect the rights of their client on trial. *See* Douglas, *The Public Trial and the Free Press, supra,* 46 A.B.A.J. at 842. What might normally be courtroom drama can easily turn into a prejudicial spectacle at the camera's prompting. *See generally* Tinkham, *Should Canon 35 Be Amended?,* 42 A.B.A.J. 843 (1956). The already sensational atmosphere generated by the fact that a particular case is television-worthy might sometimes encourage an elected prosecutor or a defense counsel to concentrate on the larger stage rather than devote every ounce of energy and thought to the cause on trial and the interests he represents there.*

* Although argument here has focused upon the rights of the accused, the State also has an important interest in the unaffected functioning of the trial process. Prosecution of defendants who have received extensive and sympathetic media coverage can only be hampered by the injection of television into the courtroom.

POINT II

The guarantees of free press and public trial do not require the admission of television cameras to the courtroom.

Those who favor the presence of television cameras in the courtroom frequently argue that this is necessary to effectuate the First Amendment guarantee of freedom of the press and the Sixth Amendment right of public trial. Both of these assertions fail when examined.

This Court has consistently held that the press (including the electronic media) enjoys no greater right of access to judicial proceedings than the public itself. *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 609-10 (1978); *Branzburg* v. *Hayes,* 408 U.S. 665, 684 (1972); *cf. Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978); *Pell* v. *Procunier,* 417 U.S. 817 (1974). This rule has been emphatically restated in *Gannett Co.* v. *DePasquale,* 443 U.S. 368 (1979). There, this Court upheld exclusion of the press from a pretrial suppression hearing, finding "the public trial guarantee as one created for the benefit of the defendant", not the press. 443 U.S. at 380.

Freedom of the press protects the right to disseminate ideas and, specifically, to publicize what reporters have seen and heard in the courtroom. *See Sheppard* v. *Maxwell, supra,* 384 U.S. at 362-63. As Mr. Justice Harlan noted in *Estes, supra,* 381 U.S. at 589:

> The rights to print and speak, over television as elsewhere, do not embody an independent right to bring

> the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

It should also be noted that restrictions on press access have been upheld in many other contexts. *Nixon* v. *Warner Communications, Inc., supra* (no special right of access by press to Watergate tapes played in open court); *Houchins* v. *KQED, Inc., supra; Pell* v. *Procunier, supra; Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974) (no special right of access by press to prison facilities or inmates); *cf. Zemel* v. *Rusk*, 381 U.S. 1 (1965) (no special right to travel to Cuba in violation of State Department travel restrictions).

Since the right of courtroom access by the press is no greater than that of the public generally, and since the presence of television poses such grave hazards to the right of the accused to a fair trial, it is clear that there is no right of constitutional dimension requiring the presence of the implements of electronic journalism in the courtroom.

POINT III

Televising judicial proceedings will not achieve the goals its advocates claim.

To argue that television cameras have no proper place in the courtroom is not to say that a free press, including the electronic media, does not play an important role in our constitutional scheme, or that the interests of the press in being present (without cameras) at a criminal trial should not be taken into account. *See Gannett Co.* v. *DePasquale, supra,* 443 U.S. at 397-403 (Powell, J., concurring). However, some television advocates argue that the educational benefits and increased public understanding and acceptance of the judicial process to be obtained from the cameras' presence far outweigh any isolated instances of prejudice which may occur. These arguments, however, overlook the fact that the prejudice inherent in televising criminal proceedings often may not be identifiable. *Estes, supra,* 381 U.S. at 544. Further, any supposed benefits to be gained from televising judicial proceedings are, at best, dubious, as the Florida statistics so well illustrate.

Several of the questions posed in the Florida Supreme Court's survey were designed to measure the effect of television on the level of understanding of the Florida legal system. Of those responding, 35.9% of jurors and 36.9% of witnesses felt that their understanding of the courts was not at all aided by the presence of television.* Further, biographical data collected as a part of the sur-

* § 1, question 1.

vey indicated that, following their period of court service when cameras and other equipment were present, both witnesses and jurors showed a marked increase in unfavorable feelings about their court experiences.*

Moreover, it is highly questionable whether the random televising of trials, by what is essentially a commercial entertainment medium, is at all suited to educating the public in the realities of the law and the judicial process. The viewing public is daily saturated with programs about police officers, judges, lawyers and trials.** Yet these programs clearly foster an image of the legal system that is far removed from the real world. Gerbner, *Trial by television: Are we at the point of no return?*, 63 Judicature 416, 418-20 (1980). Rather than educating the public, it appears equally as probable that "[t]elevision will create popular spectacles of great appeal but deceptive authenticity as it selects and interprets trials to fit the existing pattern of law in the world of television." *Id.* at 420; *see Estes, supra*, 381 U.S. at 570-72 (Warren, C.J., concurring).

The argument that televising dramatic portions of some selected trials will be educational and will show the public what courts do is hardly persuasive to most experienced lawyers and judges. *See Lawpoll: Lawyers Aren't Convinced that TV Belongs in the Courtrooms*, 65 A.B.A.J.

* For jurors, the "favorable" and "very favorable" rating dropped from 90.5% to 77.9%, while the "unfavorable" and "very unfavorable" rating rose from 5.8% to 14.4%. Witnesses' feelings paralleled those of jurors, with "favorable" and "very favorable" ratings dropping from 85.4% to 66.5%, and "unfavorable" and "very unfavorable" ratings rising from 6% to 19.9%. Part IIA(3) (Survey Results—Biographical Information) of the Survey, at 25, 23.

** Gerbner, et al., *Cultural Indicators: Violence Profile No. 9*, 28 Journal of Communication 176 (1978).

1306 (1979). Nor are courts primarily educational institutions. "[T]he chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective." *Estes, supra,* 381 U.S. at 544. To divert them from this solemn purpose in the name of public education or better public relations is to tamper with our most precious rights for gains that are, at best, speculative. *See* Gerbner, *Trial by television: Are we at the point of no return?, supra.* Other, and far more appropriate, means of public education can easily be found.

Televising trials will not provide the public with the benefits its advocates claim, but it most certainly will cause grave harm to the proper functioning of the trial process and the rights of the criminally accused. The words of Mr. Justice Clark in *Sheppard* v. *Maxwell, supra,* 384 U.S. at 362-63, are particularly appropriate:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial interferences.

Conclusion

For the reasons stated, it is respectfully requested that the judgment be reversed and the case remanded for a new trial.

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Respectfully submitted,

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* In preparing this brief, counsel has had the benefit of the assistance of Thomas M. Bistline and Anne E. Stanley of the New York Bar.